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Supreme Court of the United States

OCTOBER TERM, 1959

No. 156

HON. JULIUS H. MINER AND HON. EDWIN A. ROBSON, ETC., PETITIONERS,

vs.

H. LESLIE ATLASS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 29, 1959
CERTIORARI GRANTED OCTOBER 12, 1959

SUPREME COURT OF THE UNITED STATES

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No. 156

HON. JULIUS H. MINER AND HON. EDWIN A. ROBSON, ETC., PETITIONERS,

vs.

H. LESLIE ATLASS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

INDEX

RECORD PRESS, PRINTERS, NEW YORK, N. Y., NOVEMBER 2, 1959

[fol. A] [File endorsement omitted]

[fol. B] Heard February 3, 1959 by
Duffy, C.J., Hastings, C.J., Parkinson, C.J.

[fol. 1]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 12516

In the Matter of the Petition
of

H. LESLIE ATLASS, for exoneration from, or limitation of, liability as owner of a certain vessel known as the Yacht SIS

PETITION FOR WRIT OF MANDAMUS OR PROHIBITION—
Filed December 11, 1958

1. Petitioner, H. Leslie Atlass is a citizen and resident of the State of Illinois.

2. H. Leslie Atlass is the party petitioner in the proceeding entitled, "In the Matter of the Petition of H. Leslie Atlass for exoneration from or limitation of liability as owner of a certain vessel known as Yacht Sis in the United States District Court for the Northern District of Illinois and there numbered 57 C 722." The said proceeding is in Admiralty and is assigned to The Hon. Edwin A. Robson, Judge of said Court as of December 9, 1958 (App. 43).

3. In said action, petitioner H. Leslie Atlass seeks exoneration from or limitation of any liability arising out of the drowning of Clem Muth and Kurt Darr on or about October 25, 1956, pursuant to the statutes of the United States, and, in particular, Sections 4283, 4284, 4285 and 4289 thereof as the same may have been amended and supplemented.

4. In said action the claimants therein, Administratrixes of the Estates of the said Clem Muth and Kurt Darr, served on petitioner notices and motions to take petitioner's deposition and the depositions of Frank Johnson, Robert L. Smith and John Wasilas for discovery under Rules 25, 28 and 30 of the Federal Rules of Civil Procedure. (Copies of these notices and motions are to be found at pages 5 [fol. 2] through 16 of the appendix to petitioner's memorandum in support of this petition.) Each motion shows on its face that the purpose for which the depositions are sought is discovery only (App. 6, 9, 11 and 15).

5. On oral argument before Judge Miner on these motions on November 17, 1958. (This cause was assigned to Judge Julius Miner on March 7, 1958 (App. 17) and reassigned to Judge Robson on December 9, 1958 (App. 43) petitioner disputed the power of the court to order the taking of the depositions under the authority of the Federal Rules of Civil Procedure or any other authority except by authority of and according to the statutes of the United States for depositions *de bene esse* R.S. 863 printed as a note preceding § 1781, 28 U.S.C.A. (App. 42) but Judge Miner ruled that he would apply the Federal Rules of Civil Procedure in this Admiralty cause (App. 26).)

6. The said Federal Rules of Civil Procedure, by their express terms (see in particular, Rule 81(a) thereof), do not apply in Admiralty. In admiralty the taking of depositions is as prescribed in R.S. 863 of the Revised Statutes of the United States. There is, in Admiralty, no Supreme Court rule similar to Rule 26 of the Federal Rules of Civil Procedure.

7. Petitioner H. Leslie Atlass duly filed on November 24, 1958, at a further hearing before Judge Miner, on the aforesaid motions, affidavits of Frank Johnson, John Wasilas as well as his own showing that none of the conditions prescribed in R.S. 863 of the Revised Statutes of the United States were here existing. Copies of the said affidavits are to be found at (App. 2, 3 and 4).

8. The District Court for the Northern District of Illinois has promulgated certain "Admiralty Rules", including Rule

32 thereof, which provides that depositions may be taken as prescribed in the Federal Rules of Civil Procedure [fol. 3] "except as otherwise provided by statute";

9. The Hon. Julius H. Miner, Judge of said Court, entered on November 24, 1958, an order, in this cause, which in material part provides as follows:

"IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that claimants and complainants be and hereby are granted leave to take the depositions of:

H. LESLIE ATLASS on the 16th day of December, 1958, at the hour of 10:00 A.M.

FRANK JOHNSON on the 17th day of December, 1958, at the hour of 10:00 A.M.

ROBERT L. SMITH on the 17th day of December, 1958, at the hour of 10:00 A.M.

JOHN WASILAS on the 18th day of December, 1958, at the hour of 2:00 P.M."

A copy of said order is to be found at (App. 1).

The said order is in excess of any power granted to said court and is beyond its jurisdiction. The same is in direct contravention of the only authority given to the said court to take depositions, R.S. 863, which prescribes the conditions upon which a deposition may be taken in Admiralty, none of which are present here and it is further in contravention of the Rules of Civil Procedure which provides in Rule 81(a) that the said rules do not apply in Admiralty. The said order, and the Admiralty Rule of the Northern District of Illinois providing therefor, are, further in excess of power granted to said court to "prescribe rules for the conduct of their business" as granted in 28 U.S.C.A. § 2071, and in further excess of power granted to said court "to regulate their practice" as granted by Rule 44 of the Rules of Practice in Admiralty and Maritime cases, promulgated by the Supreme Court of the United States. The said order is, further, in excess of any power residing in a United States District Court, when sitting in Admiralty.

10. Petitioner, having exhausted, without success, every means available to secure the procedure prescribed by law [fol. 4] and by the Supreme Court of the United States, now asks this court to exercise its supervisory powers over district court procedures adopted in excess of power by issuing a writ of Mandamus or Prohibition, and further asks this court for opportunity to present oral argument thereon. Petitioner further asks that a writ to show cause issue from this Court returnable at the earliest practicable date, and further that the said order of November 24, 1958 be held in abeyance pending the disposition of this cause herein.

Wherefore, petitioner prays that a writ of Mandamus or Prohibition issue out of this court to The Hon. Julius H. Miner, Judge of the United States District Court for the Northern District of Illinois, who entered the said order of November 24, 1958, requiring the vacation of the same and to The Hon. Edwin A. Robson, and to any other Judge of the United States District Court for the Northern District of Illinois whom this cause may be assigned, prohibiting the enforcement of said order and commanding them to take no further action pursuant to said order. Petitioner further prays that said order may be forthwith stayed pending this court's consideration hereof.

Dated December 11, 1958.

H. Leslie Atlass, By Edward B. Hayes, Lord, Bissell & Brook, his attorneys, 135 South LaSalle Street, Chicago, Illinois, RAndolph 6-0466.

[fol. 5] *Duly sworn to by Edward B. Hayes, jurat omitted in printing.*

[fol. 6] Affidavit of Service (omitted in printing).

[fols. 7-8] [File endorsement omitted]

[fol. 9] Heard February 3, 1959 by
Duffy, C.J., Hastings, C.J., Parkinson, C.J.

[fol. 10]

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[Title omitted]

MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS OR PROHIBITION—Filed December 11, 1958

This is a proceeding in admiralty.

The Supreme Court has prescribed and maintained a comprehensive system of admiralty rules. They include admiralty rules for discovery. These admiralty rules govern proceedings in admiralty. They are the "Rules of Practice and Procedure in Admiralty and Maritime Cases," 28 U. S. C. A.

As to the distinct—and different—"Federal Rules of Civil Procedure," they themselves plainly say: *"These* rules do *not* apply to proceedings in admiralty." (F.R.C.P. 81 (a) 1.) The District Court nevertheless ruled, as quoted from the transcript filed here: "I am going to apply them." (Appendix p. 26)

This was no mere abuse of discretion but an arbitrary excess of power. District courts of the United States are statutory courts; they have no *powers* not given by statute.

> "And here, some legal principles interpose themselves for our government; the first of which is, that the powers of the United States courts are conferred by Acts of Congress, and cannot extend beyond the powers conferred."
>
> *U.S.* v. *Lawton,* 46 U.S. 10, 27

[fol. 11] "In short, the courts of the United States are not given discretion to make depositions not authorized by Federal Law, * * *."

Hanks Dental Association v. *Tooth Crown Co.,* 194 U. S. 303, 309

District courts have no power to merge systems of procedure that Congress and the Supreme Court have been careful to keep separate and distinct. The confusion that now exists at *nisi prius* (in excess of statutory powers) in this District Court, is not confined to this judge, nor this instance, as the record discloses. (Appendix, p. 36.) It presents a serious situation: precisely the situation the separate Supreme Court Rules for *admiralty* exist to prevent; and that the explicit mandate that the F.R.C.P. "do *not* apply to proceedings in admiralty" was written to prevent.

> "Since the formation of the Federal government there has been in America a single system of maritime law which operates with general uniformity throughout the United States. This system has its own courts and its own code of procedure. It adheres to its own precedents and cannot be affected by local decision or enactment. In most particulars it differs radically from the system of law administered by the courts of general jurisdiction."
>
> 1. American Jurisprudence, "*Admiralty*," § 1, p. 547

The writ of prohibition or mandamus is held by the Supreme Court to be peculiarly appropriate to correct district court *procedures* adopted in *excess of power*. As mentioned, the record discloses that this is not the only judge of this district court who is similarly asserting a non-existent power to apply the F.R.C.P. *in admiralty*. (Appendix, p. 36.) Interlocutory procedures are prescribed by the law-making power for a purpose; it is defeated when district judges in excess of power persistently adopt different ones, escaping correction on review over a long [fol. 12] period, or even indefinitely, because the orders are in each case interlocutory. They may (as in *U. S.* v. *Kirkpatrick*, 186 F. 2d 393, 399 (CA 3)) or may not (as in *McCulloch* v. *Cosgrave*, 309 U. S. 634) constitute error for which the final order would be reversed on an appeal. *In such a case* the Supreme Court, first pointing out that correction of unauthorized district court procedures by

prohibition or mandamus is ordinarily to be expected from the Courts of Appeal, holds that the writs may even issue directly from the Supreme Court itself *in order to protect the system of procedure that the law enjoins.* It was so held, for example, in a case in which one district court had twice failed to follow a Supreme Court rule as to the mere sequence in which certain types of civil cases should be tried. This was done in *McCulloch* v. *Cosgrave, Judge*, 309 U. S. 634, because—as later stated in *Roche* v. *Evaporated Milk Association*, 319 U. S. 21, 31, to distinguish the reasoning applicable to other situations—this was a "persistent disregard of the Rules of Procedure prescribed by this Court." Both cases refer to *Los Angeles Brush Mfg. Co.* v. *James*, 272 U. S. 701, where the Court, pointing out (p. 705) that the writ of prohibition or mandamus "has been very much extended in modern times," held that, while the ordinary course is to find such relief in the appropriate Court of Appeals:

> "If it clearly appeared, however, that a practice has been adopted by district judges, as to order or procedure in hearing causes at variance with the equity rules, our writ might well issue directly to such judges."
>
> *Los Angeles Brush Mfg. Co.* v. *James*, 272 U. S. 701, 706

[fol. 13] The injury to the particular litigant in having his case tried out of order (for which the Supreme Court issues its own writ of prohibition or mandamus in the cited case) was far less than the injury of having to submit to depositions unauthorized by law. "[T]he taking of testimony by deposition is in derogation of common right" when it is unauthorized by law. (*Randall* v. *Venable*, 17 Fed. 162, 165.) Appeal never altogether corrects what irrevocably has been done in matters antecedent to trial. The injury for which the writ issues is to the orderliness of the judicial process prescribed by the Supreme Court and by Congress—to require the district courts to respect the fixed boundaries of their statutory powers by observing at *nisi prius* the procedures prescribed after exhaustive consideration by national law-making authority instead of

their own plausible inventions that fluctuate from coast to coast and judge to judge and day to day.

The cited case makes plain that in such a case the function of protecting the prescribed interlocutory procedures *by prohibition* or *mandamus* is primarily that of the Courts of Appeal (and even the Supreme Court's own writ may issue directly to the district judges).

That is held even where the interlocutory procedure adopted below was actually *discretionary*; the writ issues because "even 'a little cloud may bring a flood's downpour if we approve the practice here indulged,'". *La Buy* v. *Howes Leather Co.*, 352 U. S. 249, 258. Even the unsuccessful argument of the dissenting justices in the case last cited, viz., that the district court's order was discretionary, does not exist here (p. 261). Orders such as *this* are *not* discretionary practice, but mere excess of [fol. 14] power: "In short, the courts of the United States *are not given discretion* to make depositions not authorized by Federal Law." *Hanks Dental Association* v. *Tooth Crown Co.*, 194 U. S. 303, 309, *supra*. *A fortiori* the writ will issue to end a district court practice adopted at *nisi prius* which would mistakenly exert, not merely a discretionary power, but a non-existent power, not given at all. It was cases in which lower courts exceeded their *power* that historically brought the writ of prohibition or mandamus into existence. And the writ "has been greatly extended in modern times." (Auth. cit.)

Not only did the Supreme Court, in adopting Rule 26 (b) of F.R.C.P. for unconditional oral depositions provide that "*These* rules do *not* apply in admiralty." After some years of experience with the F.R.C.P. in law and equity, the admiralty rules themselves were amended.[1] The amendments incorporated into admiralty practice nearly all of the discovery provisions of the F.R.C.P., *in haec verba. But Rule 26(b) of the F.R.C.P. for deposition discovery was not incorporated into the admiralty system.* The Supreme Court thus reiterated, on the basis of experience, the original determination that the provisions of the F.R.C.P. for

[1] See Historical Notes—Admiralty Rules 31 through 32 C, 28 U.S.C.A.

unconditional oral deposition discovery "do *not* apply to proceedings in admiralty." This District Court ruled: "I am going to apply them." (Appendix, p. 26)

The statutory district courts have no such power. Until the F.R.C.P. in 1932 gave the district courts new deposition powers in law and equity, the deposition powers of the [fol. 15] statutory district courts of the United States in law, equity and admiralty, rested on the familiar *de bene esse* statute, construed in the *Hanks* case, above quoted.[1]

Whether the new deposition powers given to district courts in law and equity by the F.R.C.P. should be extended, also, to the admiralty—or should continue *in admiralty* to be only those given under the existing *de bene esse* act and the 46th admiralty rule—was a question presented to the law-making authority. It clearly answered that question in the F.R.C.P. themselves: "These rules do *not* apply to proceedings in admiralty." Like all provisions of the F.R.C.P. that has the force and effect of a statute. (*Winsor* v. *Daumit*, 176 F. 2d 475, 477 (CA 7))

Nor is this all. Congress was careful not to repeal the *de bene esse* act (as it repealed many other statutes when the F.R.C.P. were adopted). The *de bene esse* act (R.S. 863-865) was formerly 28 U.S.C.A. 639-641; now printed as a note preceding 28 U.S.C.A. 1781 with the notation: "Former sections 639-641 of Title 28 *are applicable to admiralty proceedings only.*" (Our emphasis) Superseded by the F.R.C.P. for law and equity, the *de bene esse* statute remained the governing source of the deposition power in the statutory courts of the United States—in admiralty. Note preceding 28 U.S.C.A. § 1781; *Mercado* v. *U. S.*, 184 F. 2d 24, 27 (CA 2 1950); Mulligan v. U. S., 87 F. Supp. 79 (D.C. N.Y. 1949).

[fol. 16] The point is not merely that these depositions here are "for discovery only" (see the motions therefor, Appendix pp. 6, 9, 11 and 15) and that, where the *de bene*

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[1] And so construed in many other cases, including those referred to below, with no cases to the contrary.

The statute is quoted in Appendix p. 42.

Section 1 carefully enumerates the specific conditions in which depositions may be taken. Section 2 even specified the continuance of these same conditions when the deposition is *used*.

esse statute is the governing law (as it continues to be in admiralty) depositions "for discovery only" are beyond the *power* of the statutory district courts. "It has no power to subject a party to such an examination as this." *Ex parte Fisk*, 113 U. S. 713, 724; *Shellabarger* v. *Oliver*, 64 Fed. 306, 308 (C.C.D. Kan. 1894); *Frost* v. *Barber*, 173 Fed. 847 (C.C.S.D. N.Y. 1909); *Green* v. *Victor Talking Mach. Co.*, 15 F. 2d 869, 870 (D.C. E.D. N.Y. 1926).

The point is further, and even more fundamentally, that the governing statute does not allow the statutory district courts any power to take depositions *at all*, for any purpose, *save in those instances* that the statute governing that power specifically enumerates—viz., when the witness lives more than one hundred miles from the place of trial, is bound on a voyage to sea, and so on through an elaborate, specific list of carefully enumerated instances set forth by Congress in the statute, *none of which exists here.* (Appendix, pp. 2, 3 and 4). Congress and the Supreme Court knew that this was the well-settled meaning of the *de bene esse* statute when they subjected the deposition provisions of the *F.R.C.P.* to the express mandate: "*These* rules do *not* apply to proceedings in *in admiralty*"—and preserved the *de bene esse* statute in force *in admiralty.* Quoting the *de bene esse* act from the chapter of the U. S. Revised Statutes on "Evidence," the Supreme Court emphatically denies existence of any such power in a district court.

> [fol. 17] *"It has no power to subject a party to such an examination as this.* Not only is no such power conferred, but it is prohibited by the plain language and equally plain purpose of the chapter on Evidence of the Revision."
>
> *Ex parte Fisk*, 113 U. S. 713, 724-725

It will be observed that this is a lack of power *not only* with respect to the *use* of depositions not provided for by the act, but as to their *taking*—the subject covered by Section 1 of the statute. (Appendix, p. 42) The power is lacking, because it is "not conferred." Not only so; it is "prohibited." (Auth. cit.)

"No one can examine these provisions for procuring testimony to be used in the courts of the United States and have any reasonable doubt that, so far as they apply, they were intended to provide a system to govern the practice, in that respect, in those courts. They are, in the first place, too complete, too far-reaching, and too minute to admit of any other conclusion. But we have not only this inference from the character of the legislation, but it is enforced by the express language of the law in providing a defined mode of proof in those courts, and in specifying the only exceptions to that mode which shall be admitted.

"This mode is 'by oral testimony and examination of witnesses in open court, except as hereinafter provided.'"

Ex parte Fisk, 113 U. S. 713, 722-723

The latter provision was continued in full force *in admiralty* by the Supreme Court's *admiralty* Rule 46:

"In all trials in admiralty the testimony of witnesses shall be taken orally in open court, except as otherwise provided by statute or agreement of the parties."

Admiralty Rule 46, 28 U.S.C.A.

In *Despeaux* v. *Pennsylvania R. Co.*, 81 Fed. 897 (C.C. E.D. Pa. 1897) a district court had adopted *a district court rule* allowing depositions "without regard" to the existence [fol. 18] of circumstances specified by Section 1 of the *de bene esse* act. The district court held its rule invalid, saying:

"In my opinion, the very question now presented was decided in *Ex parte Fisk*, 113 U. S. 713, 5 Sup. Ct. 724, and in such a manner as to preclude the granting of the order now asked for. I cannot agree that the question is one of the personal privilege of A. J. Cassatt.' *It is a question of the court's* authority."

Despeaux v. *Pennsylvania R. Co., supra*, p. 898

A local rule in this District Court says: "The taking and use of depositions of parties and witnesses shall be governed by the Federal Rules of Civil Procedure, *except as otherwise provided by statute* and except" etc., etc. (The rule is fully quoted in the Appendix, p. 44.) Certain judges of this District Court who allow depositions provided for only by the F.R.C.P. (which "do not apply in admiralty proceedings") overlook that the statute which "otherwise provides" is the *de bene esse* act, which Congress deliberately preserved for admiralty alone when the F.R.C.P. were adopted. There is no other statute that "otherwise provides"—nor, indeed, *could* otherwise provide, since the F.R.C.P. superseded former statutes except in admiralty where they "do not apply."

The exception of the local rule ("except as otherwise provided by statute") has a cogent judicial history. The Supreme Court's Rule 46 *in admiralty*, above quoted, has just that language. Read with the *de bene esse* act, which applies *in admiralty* alone, such a provision forbids a district court "to subject a party to an examination such as this." *Ex parte Fisk*, 113 U. S. 713, 722-725, *supra*.

[fol. 19] Moreover, the rule-making power of district courts, like all their powers, is derived from statutes and cannot rise higher than its source. Since 1948 the statutes provide:

> "The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court. June 25, 1948, c. 646, 62 Stat. 961, amended May 24, 1949, c. 139, § 102, 63 Stat. 104."
>
> 28 U.S.C.A. § 2071

When the *de bene esse* act does not "otherwise provide" there may, or may not, be some valid function for this district court rule. That is not the present inquiry. To authorize these depositions it would have had to be read as an attempt by this statutory district court to confer deposition power on itself that the statute does not confer

(which the Supreme Court says, as above quoted, the statute prohibits) and contrary to the Supreme Court mandate that the F.R.C.P. "do not apply to proceedings in admiralty"—a mandate adhered to when the admiralty discovery rules were amended, and the deposition discovery provisions of the F.R.C.P. were again excluded from the *admiralty* practice—and, in any such reading a local district court rule would be void. Even before the act of 1948, district court rules purporting to give themselves power to take depositions for purposes or in instances not allowed by the *de bene esse* act were void. *Despeaux* v. *Pennsylvania R. Co.*, 81 Fed. 897 (C.C.E.D. Pa. 1897) and *Randall* v. *Venable*, 17 Fed. 162 (C.C. W.D. Tex. 1883).

More than eight years ago the Court of Appeals for the Second Circuit in *Mercado* v. *United States*, 184 F. 2d 24, [fol. 20] 28 (CA 2, 1950) approved and adopted the reasoning of the district court in *Mulligan* v. *U. S.*, 87 F. Supp. 7[illegible]. That reasoning is:

> "Significant is the omission from the Admiralty Rules of a provision corresponding to Civil Rule 26(a) which expressly established the practice of deposition upon oral examination for the purpose of discovery or for use in evidence. The omission of so important a provision could hardly be accidental.
>
> "Three possible explanations present themselves. One is that the right to oral examination for purposes of discovery was such an established part of admiralty practice that explicit provision for it was deemed unnecessary by the revisers of the Admiralty Rules. Such an explanation does not accord with the facts of history. 3 Benedict on Admiralty, 6th Ed., 1940, 34.
>
> "A second explanation is that oral examination for purposes of discovery was not used in admiralty and the revisers did not intend to introduce this feature of the new Civil Rules into admiralty procedure. Under this theory, the language in Rule 32C which refers to oral examination is an oversight on the part of the draftsmen who, when incorporating Rule 37 of the

Civil Rules, neglected to prune out the inapplicable language.

"A third explanation is that the revisers did not intend to authorize oral discovery proceedings and that the reference in Rule 32C to oral examinations relates to the kind of oral examination which is authorized in admiralty, namely, de bene esse depositions under 28 U.S.C.A. § 639 (pre-revision designation). This explanation, it is true, gives to the words of 32C a different content than the same words have in Civil Rule 37. But there is no reason why they should have the same. The advantage of this reading is that it overcomes the necessity of attributing to the revisers of the Admiralty Rules either a historical inaccuracy or the careless inclusion in 32C of the inapplicable language borrowed from Civil Rule 37.

"That part of libellant's notice which calls for deposition upon oral examination for purposes of discovery is vacated."

Mulligan v. *U. S.*, 87 F. Supp. 79, 80-81

[fol. 21] The opinion of the Second Circuit adopted that, because it is the law. *(Mercado* v. *U. S., supra.)* Chief Judge Clark of that court and author of that opinion, was active (as a law-school professor) in formulating the F.R.C.P. and since 1935 has been the reporter of the Supreme Court's advisory commission on federal civil procedure. His opinion reflects his personal opposition to the plain decision of the law-making authority that "these rules do not apply to proceedings in admiralty" and equally that he knows what the law is (none knows better) and he follows the law that the law-making authority made, according to what he describes as "the ordinary ground rules of judicial decision;" viz., that statutory courts of the United States are not legislatures (or, as he puts it, "reform organizations.") It is significant that so well-informed a judge declares that this is the law, notwithstanding personal temptation (he uses the word) to sophisticate it. He expresses the hope that the rules will be changed to effect the revolution of merging admiralty with

law and equity except in a few instances such as limitation proceedings. (This is a limitation proceeding.) *That was nearly nine years ago.* The Supreme Court was not impressed. There has been no change.

In conclusion, therefore, we urge this Court to grant the relief sought by petitioner to prevent the procedure ordered below in excess of power, in persistent disregard of the rules of procedure ordained by Congress and the Supreme Court, and in derogation of common right.

Once such orders as this are complied with and district judges find they are free of the supervisory control of this [fols. 22-25] reviewing court, neither petitioner's rights nor the procedures ordained by law can be restored by appeal.

Respectfully submitted,

Edward B. Hayes, Warren C. Ingersoll, Lord, Bissell & Brook, Proctors for Petitioner.

[fol. 26]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case No. 57 C 722

In the Matter of the Petition
of
H. LESLIE ATLASS, for exoneration from, or limitation of, liability as owner of a certain vessel known as the Yacht SIS

ORDER GRANTING LEAVE TO TAKE DEPOSITIONS—
Dated November 24, 1958

On Motion of claimants and complainants, Catherine E. Muth, Administratrix of the Estate of Clem Muth, Deceased, and Mollie Darr, Administratrix of the Estate of Kurt Darr, Deceased, for an order granting leave to claimants and complainants, to take the depositions of H. Leslie Atlass, Frank Johnson, Robert L. Smith, and John Wasilas,

It Is Hereby Ordered, Adjudged and Decreed, that claimants and complainants be and hereby are granted leave to take the depositions of:

H. Leslie Atlass on the 16th day of December, 1958, at the hour of 10:00 A.M.

Frank Johnson on the 17th day of December, 1958, at the hour of 10:00 A.M.

Robert L. Smith on the 17th day of December, 1958, at the hour of 10:00 A.M.

John Wasilas on the 18th day of December, 1958, at the hour of 2:00 P.M.

All above depositions shall be taken before Frederick Julian, a notary public in and for the County of Cook, State of Illinois, or any other authorized notary public in and for the County of Cook, State of Illinois, and said depositions shall proceed and continue from day to day until completed, and shall be taken at the offices of Seyfarth, Shaw, Fairweather & Geraldson, Suite 1215, 231 S. LaSalle Street, Chicago 4, Ill.

Enter:

Miner, Judge.

Date: Nov. 24, 1958

Excepted and Objected to by Counsel for Petitioner

[fol. 27]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Title omitted]

AFFIDAVIT OF FRANK JOHNSON—Filed November 24, 1958

Frank Johnson, being first duly sworn, deposes and says that he is the Frank Johnson named in the Motions for Discovery filed herein; that he does not live at a greater distance from Chicago, Illinois, the place of trial of the captioned matter, than one hundred miles, and now resides within the Northern District of Illinois; that he is not now

on a voyage to sea or out of the United States or out of the Northern District of Illinois or at a greater distance than one hundred miles from Chicago, Illinois; that he is not ancient and infirm; that he Robert Smith named in the Motions for Discovery filed herein is not now employed by him; and that this affiant has no present knowledge of the present location or occupation of the said Robert Smith.

Frank Johnson

State of Illinois,
County of Cook, ss.:

Subscribed and Sworn to before me this 13th day of November, 1958.

J. V. McLoughlan, Notary Public. My Commission Expires Sept. 13, 1960.

[fol. 28]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Title omitted]

AFFIDAVIT OF JOHN WASILAS—Filed November 24, 1958

John Wasilas, being first duly sworn, deposes and says that he is the John Wasilas named in the Motions for Discovery filed herein; that he does not live at a greater distance from Chicago, Illinois, the place of trial of the captioned matter, than one hundred miles, and now resides within the Northern District of Illinois; that he is not now on a voyage to sea or out of the United States or out of the Northern District of Illinois or at a greater distance than one hundred miles from Chicago, Illinois; that he is not ancient and infirm; that the Robert Smith named in the Motions for Discovery filed herein is not now employed by him; and that this affiant has no present knowledge of the present location or occupation of the said Robert Smith.

John Wasilas

State of Illinois,
County of Cook, ss.:

Subscribed and Sworn to before me this 13th day of November, 1958.

J. V. McLoughlan, Notary Public. My Commission Expires Sept. 13, 1960.

[fol. 29]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Title omitted]

AFFIDAVIT OF H. LESLIE ATLASS—Filed November 24, 1958

H. Leslie Atlass, being first duly sworn, deposes and says that he is the Petitioner in the captioned matter; that he does not live at a greater distance from Chicago, Illinois, the place of trial of the captioned matter, than one hundred miles, and now resides within the Northern District of Illinois; that he is not now on a voyage to sea or out of the United States or out of the Northern District of Illinois or at a greater distance than one hundred miles from Chicago, Illinois; that he is not ancient and infirm; that the Robert Smith named in the Motions for Discovery filed herein is not now employed by him; and that this affiant has no present knowledge of the present location or occupation of the said Robert Smith.

H. Leslie Atlass

State of Illinois,
County of Cook, ss.:

Subscribed and Sworn to before me this 13th day of November, 1958.

J. V. McLoughlan, Notary Public. My Commission Expires Sept. 13, 1960.

[fol. 30]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Title omitted]

NOTICE OF MOTION—Filed February 7, 1958

To: Lord, Bissell & Brook, 135 South LaSalle Street, Chicago 3, Illinois; Director & Liebenson, One North LaSalle Street, Chicago 2, Illinois.

Please Take Notice that on Friday, February 7, 1958, at the hour of 10:00 A.M., in the forenoon, the claimant and complainant, Catherine E. Muth, Administratrix of the Estate of Clem Muth, Deceased, by her attorneys, will appear before the Honorable Win G. Knoch, United States District Judge, U. S. District Court House, Chicago 3, Illinois, or before any other Judge sitting in his place or stead, and then and there present a motion, a copy of which is attached hereto and served herewith requesting that an order be entered in accordance with the provisions of said motion, at which time and place you may appear if you so see fit.

Robert W. Macdonald, John C. Fox.

Acknowledgments of service (omitted in printing).

[fol. 31]

MOTION—Filed February 7, 1958

Now Comes the claimant and complainant, Catherine E. Muth, Administratrix of the Estate of Clem Muth, Deceased, by her attorneys, and moves the Court as follows:

For an Order, pursuant to Admiralty Rule 32 and Rules 26, 28 and 30 of the Federal Rules of Civil Procedure, granting the claimant and complainant leave to take the oral depositions of H. Leslie Atlass, petitioner herein, and Frank Johnson, a material witness herein, for the purpose of discovery only, on the 27th day of February, 1958, at the hour of 10:00 A.M., at the offices of Seyfarth, Shaw, Fairweather & Geraldson, at suite 1215, 231 South LaSalle

Street, Chicago 4, Illinois, before Frederick Julian, a notary public in and for the County of Cook, State of Illinois, or any other authorized notary public in and for the County of Cook, State of Illinois, said depositions to proceed from day to day until completed.

Robert W. Macdonald, John C. Fox, Attorneys for Claimant and Complainant.

Seyfarth, Shaw, Fairweather & Geraldson, 231 South La Salle Street, Chicago 4, Illinois, Of Counsel.

[fol. 32]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Title omitted]

NOTICE OF MOTION—Filed March 27, 1958

To: Edward B. Hayes and Lord, Bissell & Brook, 135 South La Salle Street, Chicago 3, Illinois; Director & Liebenson and Raszus & Harris, 1 North La Salle Street, Chicago 2, Illinois.

Please Take Notice that on Thursday, March 27, 1958, at the hour of 10:00 A.M. in the forenoon, the claimant and complainant, Catherine E. Muth, Administratrix of the Estate of Clem Muth, Deceased, by her attorneys, will appear before the Honorable Julius Miner, United States District Judge, U. S. District Court House, Room 237, Chicago 3, Illinois, or before any other Judge sitting in his place or stead, and then and there present a motion, a copy of which is attached hereto and served herewith requesting that an order be entered in accordance with the provisions of said motion, at which time and place you may appear if you so see fit.

Robert W. Macdonald, John C. Fox.

Seyfarth, Shaw, Fairweather & Geraldson, 231 South La Salle Street, Chicago 4, Illinois, Of Counsel.

[fol. 33] Affidavit of service (omitted in printing).

[fol. 34] MOTION—Filed March 27, 1958

Now Comes the claimant and complainant, Catherine Eleanor Muth, Administratrix of the Estate of Clem Muth, Deceased, by her attorneys, and moves this Court to enter an order allowing claimant to take the discovery deposition of H. Leslie Atlass and others, as set out in claimant's motion heretofore filed in this cause. Claimant further moves the Court, if it desires, prior to entering said order requested above, to hear oral arguments instanter on said motion.

Robert W. Macdonald, John C. Fox, Attorneys for Claimant and Complainant.

Seyfarth, Shaw, Fairweather & Geraldson, 231 South La Salle Street, Chicago 4, Illinois, Of Counsel.

[fol. 35]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Title omitted]

NOTICE OF MOTION—Filed March 9, 1958

To: Edward B. Hayes and Lord, Bissell & Brook, 135 South La Salle Street, Chicago, Illinois; Seyfarth, Shaw, Fairweather & Geraldson, 231 South La Salle Street, Chicago, Illinois.

Please Take Notice that on Wednesday, May 7, 1958, beginning at the hour of 10:00 P.M. in the afternoon, the claimant and complainant, Mollie Darr, Administrator of the Estate of Kurt Darr, Deceased, by her attorneys, will appear before the Honorable Julius H. Miner, United States District Judge, U. S. District Court House, Chicago 3, Illinois, or before any other Judge sitting in his place or stead, and then and there present a motion, a copy of which is attached hereto and served herewith requesting that an order be entered in accordance with the provisions of said

motion, at which time and place you may appear if you so see fit.

Director & Liebenson and Raszus & Harris, By: John E. Harris, Proctors for Claimant, Mollie Darr.

Acknowledgments of service (omitted in printing).

[fol. 36] MOTION—Filed March 9, 1958

Now Comes the claimant and complainant, Mollie Darr, Administrator of the Estate of Kurt Darr, Deceased, by her attorneys, and moves the Court as follows:

For an Order, pursuant to Admiralty Rule 32 and Rules 26, 28 and 30 of the Federal Rules of Civil Procedure, granting the claimant and complainant leave to take the oral depositions of H. Leslie Atlass, petitioner herein, and Frank Johnson, Robert L. Smith and John Wasilas, material witnesses herein, for the purpose of discovery only, on the 16th day of May, 1958, beginning at the hour of 1:00 P.M. at the offices of Raszus & Harris, at Suite 941, 1 North La Salle Street, Chicago 2, Illinois, before Lenore Weiss, a notary public in and for the County of Cook, State of Illinois, or before any other authorized notary public in and for the County of Cook, State of Illinois, said depositions to proceed from day to day until completed.

Raszus & Harris and Director & Liebenson, By: John E. Harris, Proctors for Claimant, Mollie Darr.

Raszus & Harris and Director & Liebenson, 1 North La Salle Street, Chicago 2, Illinois, RAndolph 6-9242.

[fol. 37]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Title omitted]

MOTION TO AMEND MOTION—Filed March 9, 1958

Now Comes the claimant and complainant, Catherine E. Muth, Administratrix of the Estate of Clem Muth, Deceased, by her attorneys, and moves the Court as follows:

To Amend her motion heretofore filed by adding thereto the names of Robert L. Smith and John Wasilas, material witnesses herein to said motion previously filed.

Henry E. Seyfarth, Robert W. Macdonald, John C. Fox, Attorneys for Claimant and Complainant.

Seyfarth, Shaw, Fairweather & Geraldson, 231 South La Salle Street, Chicago 4, Illinois, Of Counsel.

Acknowledgment of service (omitted in printing).

[fol. 38]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Title omitted]

NOTICE—Filed October 21, 1958

To: Edward B. Hayes and Lord, Bissell & Brook, 135 South La Salle Street, Chicago 3, Illinois; Director & Liebenson and Raszus & Harris, 1 North La Salle Street, Chicago 2, Illinois.

Please Take Notice that on Tuesday, October 21, 1958, at the hour of 10:00 A.M. in the forenoon, the claimant and complainant, Catherine E. Muth, Administratrix of the Estate of Clem Muth, Deceased, by her attorneys, will appear before the Honorable Julius Miner, United States District Judge, U. S. District Court House, Room 237, Chicago 3, Illinois, or before any other Judge sitting in his place or stead, and then and there present a motion, a copy of which is attached hereto and served herewith requesting that an order be entered in accordance with the provisions of said motion, at which time and place you may appear if you so see fit.

Robert W. Macdonald, Robert H. Joyce.

Seyfarth, Shaw, Fairweather & Geraldson, 231 South LaSalle Street, Chicago 4, Illinois, Of Counsel.

[fol. 39] Affidavit of service (omitted in printing).

[fol. 40] MOTION—Filed October 21, 1958

Now Comes the claimant and complainant, Catherine Eleanor Muth, Administratrix of the Estate of Clem Muth, Deceased, by her attorneys, and represents to this Court as follows:

1. That on April 27, 1958, the above captioned Petition was filed and in the due course of events, assigned to Judge Win G. Knock;

2. That subsequent to the filing of the aforesaid Petition, this claimant and complainant, through her attorneys, made a Motion before Judge Knock for leave to take discovery depositions in this cause;

3. That on February 8, 1958, said Motion was entered by Judge Knock and taken under advisement on briefs of the parties hereto which were duly filed with the Court;

4. That on March 7, 1958, the above entitled cause was reassigned by the Executive Committee to Judge Julius Miner;

[fol. 41] 5. That at the present time no judicial determination has been made of the claimant and complainant's motion.

Wherefore, the claimant and complainant, Catherine Eleanor Muth, Administratrix of the Estate of Clem Muth, Deceased, by her attorneys, moves this Court to entertain and decide the aforesaid motion on the briefs heretofore filed and oral argument if the Court so desires.

Robert W. Macdonald, Robert H. Joyce, Attorneys for Claimant and Complainant.

Seyfarth, Shaw, Fairweather & Geraldson, 231 South LaSalle Street, Chicago 4, Illinois, Of Counsel.

[fol. 42]

IN UNITED STATES DISTRICT COURT

Office of the Clerk
United States Court House
Chicago 4

Date: 3-11-58

[Title omitted]

NOTICE AS TO REASSIGNMENT OF CAUSE ON MARCH 7, 1958

You are hereby notified that Judge Ex. Comm. entered the following order on 3-7-58:
Cause reassigned to Judge Miner (Draft).

Roy H. Johnson, Clerk.

[fol. 44]

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Title omitted]

Transcript of Proceedings—November 17, 1958

had in the above-entitled cause before the Honorable Julius H. Miner, one of the Judges of said Court, in his court room in the United States Court House at Chicago, Illinois, on Monday, November 17, 1958, at 10:00 o'clock a. m.

APPEARANCES:

Lord, Bissell & Brook (135 South LaSalle Street, Chicago 3, Illinois), by Edward B. Hayes, Esq., Proctors for Petitioner;

Seyfarth, Shaw, Fairweather & Geraldson (Suite 1215, 231 South LaSalle Street, Chicago 4, Illinois), by Robert W. Macdonald, Esq., Robert H. Joyce, Esq., and John C. Fox, Esq., Attorneys for Claimant and Complainant, Catherine E. Muth;

[fol. 45]

Raszus & Harris and Director & Liebenson (One North LaSalle Street, Chicago 2, Illinois), by John E. Harris, Esq., Edward G. Raszus, Esq., and Harold A. Liebenson, Esq., Proctors for Claimant, Mollie Darr.

[fol. 46] And thereupon the following proceedings were had herein:—

By the Clerk: In the Matter of the Petition of H. Leslie Atlass, for exoneration from, or limitation of, liability as owner of a certain vessel known as the Yacht SIS, for leave to take certain discovery depositions.

By Mr. Macdonald: In February, we filed our motion asking for a discovery deposition of the petitioner. I represent the claimant, Mrs. Catherine E. Muth and these gentlemen represent—

By the Court: Is this an admiralty case?

By Mr. Macdonald: Yes, and we asked for leave to take depositions. We filed our motion last February. We filed briefs. The case was subsequently transferred to your Honor. We have been in twice. Two weeks ago it was set down for an order.

By the Court: That is the case where Judge Campbell ruled on the motions?

By Mr. Macdonald: Judge Knoch.

By the Court: And not Judge Campbell.

By Mr. Raszus: Judge Campbell never had this case.

[fol. 47] By Mr. Liebenson: Not on this case. He ruled that depositions were admissible.

By the Court: I don't see any reason why not.

By Mr. Hayes: I have considerable that I wish to present to your Honor, if I may be heard on it.

By the Court: Briefs were filed?

By Mr. Liebenson: Extensive briefs were filed.

By the Court: I don't see anything in your briefs and there is nothing in the Act that warrants it; there is nothing prohibited.

By Mr. Liebenson: Since the filing of the briefs there is a new law that has been filed that brings it out more strongly in favor of oral depositions.

By Mr. Hayes: There has been and it has the exact contrary effect. As a matter of fact, referring to the Dowelling case which they cite extensively, the District Court in that same circuit determined since that case in 1955 that the Dowelling case did not authorize discovery depositions of either party's witnesses in admiralty cases by notice and it made no attempt to disturb prior practice. That is the only means by which a party can examine a witness who is under the de bene esse statutes, none of which make provi- [fol. 48] sion for the discovery deposition of a witness. This is a matter which falls in a field of law in which the authorities themselves will be understood, your Honor, only in the light of a full presentation and I earnestly ask your Honor to allow me to make that presentation.

By Mr. Macdonald: Your Honor, I don't want to preclude counsel from having his day in court and from having an opportunity to argue this but it is repetitious of the entire argument we went through before Judge Knoch and he said, "Gentlemen, I have heard your arguments and the record speaks for itself. Will you kindly submit briefs?" We made a very exhaustive study of the law. I think Mr. Hayes relies pretty much on Rule 81 that says these rules shall not apply in admiralty. Compared to that, when you have the general rule, when you have a general rule as compared with a specific rule, the law is certainly well settled. The specific provisions of the statute prevail.

We have been confronted, since February, with the taking of these depositions. It is not fair to the two widows that they be forced to sit back and not take a position and be able to know and prepare the case for trial. As I say, it has [fol. 49] been almost a year. It will be a year in February and I believe, while counsel has been heard on this question, briefs have been filed and we believe there is no question but that we are entitled to these depositions. We are here specifically for the purpose of asking that this order be entered.

By Mr. Hayes: If your Honor please, you do not have the advantage of the argument that was had before Judge Knoch. It is precisely that that I want to present.

By the Court: How long ago were you before Judge Knoch?

By Mr. Hayes: I think I can state my case, your Honor, in twenty minutes. The thing I am urging, or one of them, which is by no means what counsel calls attention to, is where the Supreme Court and Congress, in considering this question, determined that the Federal Rules of Civil Procedure do not apply in admiralty. Counsel would read a rule to this Court to the effect that they apply in admiralty. The rules of this Court say absolutely nothing about depositions for discovery.

By the Court: I understand that that is your position.

By Mr. Hayes: And, more than that, this is a situation [fol. 50] which is governed by statute which Congress perpetuated for admiralty alone at the time when the Rules of Civil Procedure were adopted.

By the Court: Does that statute prohibit the taking of depositions?

By Mr. Hayes: That statute conditions the right of taking depositions for any purpose upon facts and circumstances which do not exist here.

By Mr. Macdonald: What rule is that?

By the Court: What rule is that?

By Mr. Hayes: I am referring to the de bene esse rule.

By the Court: Which you cited, which authorizes the taking of de bene esse depositions to be used in evidence where the witness is unable to attend the trial. That is the only theory. I don't find anything in there that prohibits the taking of depositions prior to trial.

By Mr. Hayes: That does. The testimony of any witness may be taken in any civil cause pending, de bene esse, when the witness lives at a greater distance than one hundred miles from the place of trial or hearing, or is bound on a voyage at sea, and there are other conditions which are logged, none of which here exist. That statute prescribes [fol. 51] the conditions under which depositions may be taken under admiralty. That statute was preserved for admiralty, for admiralty alone. When Congress and the Supreme Court abrogated it with respect to common law and equity and adopted it for the first time, the only thing which gives any right to any deposition for discovery is Rule 26(b) and, in adopting those rules, it was provided by the Supreme Court and Congress that these rules shall not apply in admiralty.

By the Court: I am going to apply them. The depositions will be allowed.

By Mr. Macdonald: Here is the proposed draft order. Mr. Hayes, we have not designated the place of the taking of the depositions for the reason that we wanted to work that out with counsel. Nor, have we designated the day or the hour because we wanted that to be at the convenience of counsel. We have left blank those two factors and have listed the rest.

By the Court: Can you agree on the time and place?

By Mr. Macdonald: I hope we can, your Honor. I hope we can. That is the reason why I left those parts of the order blank so we wouldn't have any objection to it and [fol. 52] could allow counsel to name the date.

By the Court: You agree on the time. You will have a right to preserve your point.

By Mr. Raszus: If the Court please, if they want our client's deposition at the same time, we will give it to them.

By Mr. Hayes: If your Honor please, the order is—I presume, your Honor, as indicated, it is clearly understood that any agreement as to time and place will be without prejudice.

By the Court: I said without prejudice. I just got done saying it.

By Mr. Hayes: I so understood.

By the Court: There is no question about it. You preserve your point.

By Mr. Macdonald: Mr. Hayes, I wouldn't prejudice your rights. I wouldn't prejudice Mr. Hayes' rights.

By the Court: I want the order to so show.

By Mr. Macdonald: If on the other hand counsel won't agree, we will ask the Court to fix the time.

By the Court: I want him to tell you what the most convenient time is.

By Mr. Macdonald: If they won't agree, we will ask the Court to fix the time.

[fol. 53] By the Court: Supposing you don't agree. Supposing he just gives you the date.

By Mr. Macdonald: You tell us the date.

By Mr. Hayes: I shall have to find out. He wants the depositions of five people.

By Mr. Macdonald: Four.

By the Court: I will continue the entry of the order for a couple of days.

By Mr. Macdonald: May the order be entered subject to—

By the Court: The convenience of the parties, yes.

By Mr. Macdonald: The order will be entered subject to being filled in as to the time and date, is that right?

By Mr. Hayes: The Court says he will continue the order.

By Mr. Macdonald: Now, just a minute. We want to be sure we know where we are going. The order will be entered?

By the Court: The order will be entered, except as to the time and place.

By Mr. Macdonald: May we fix the time in the record, at least; that counsel and ourselves will work out the times of the taking of these depositions not later than tomorrow [fol. 54] night?

By the Court: I want counsel to ascertain when it will be convenient as to the time and he can work it out with you. I will enter the order if you can't agree.

By Mr. Macdonald: All right. Now, supposing he can't tell me when these can be taken?

By the Court: A week from today for the entry of the order. Work it out.

[fol. 55] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 56]

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Title omitted]

Transcript of Proceedings of November 24, 1958

had in the above-entitled cause before the Honorable Julius H. Miner, one of the Judges of said Court, in his court room in the United States Court House at Chicago, Illinois, on Monday, November 24, 1958, at 10:00 o'clock a. m.

APPEARANCES:

Lord, Bissell & Brook (135 South LaSalle Street, Chicago 3, Illinois), by Edward B. Hayes, Esq., Proctors for Petitioner;

Seyfarth, Shaw, Fairweather & Geraldson (Suite 1215, 231 South LaSalle Street, Chicago 4, Illinois), by Robert W. Macdonald, Esq., Robert H. Joyce, Esq., and John C. Fox, Esq., Attorneys for Claimant and Complainant, Catherine E. Muth;

[fol. 57]

Raszus & Harris and Director & Liebenson (One North LaSalle Street, Chicago 2, Illinois), by John E. Harris, Esq., Edward G. Raszus, Esq., and Harold A. Liebenson, Esq., Proctors for Claimant, Mollie Darr.

[fol. 58] And thereupon the following proceedings were had herein:—

By the Clerk: No. 57 C 722, In the Matter of the Petition of H. Leslie Atlass for presentation of draft.

By Mr. Hayes: Good morning, your Honor. This was the matter in which your Honor suggested, when we were discussing the admitted fact that none of the conditions of the de bene esse act in taking depositions existed here, it might be effected by the absence of a prohibition in the de bene esse act of taking a deposition under other circumstances and different instances than those which it prescribes. The suggestion took me somewhat by surprise.

The de bene esse act has been construed quite frankly. Where it applies, as it now applies, in admiralty only, the Supreme Court has held a number of times it does not allow the taking of depositions in any instances other than those which it itself prescribes.

I don't want to impose on your Honor's time with an argument which your Honor does not wish to hear but I have the cases which do so hold here this morning and they, [fol. 59] of course, go to the root of this matter. I didn't want to let that go without some comments on that.

By the Court: Is that the case you read before?

By Mr. Hayes: No, I did not. The history of the de bene esse act—it is a Federal statute, of course—is pretty well

understood. The Supreme Court has made it clear. They are cases in which an attempt was made to take depositions under rules very much like the Federal Rules of Civil Procedure. Those rules did not apply in those cases and the Federal Rules of Civil Procedure do not apply in this one.

The holding of the Supreme Court was where the de bene esse act does apply, as it does in admiralty and in adiniralty alone, depositions are precluded in any instances as they are enumerated by the de bene esse act. That goes to the root of the question and it would not be fair for me not to tell your Honor that I have those cases and that that existed. I have them here this morning.

By Mr. Macdonald: Your Honor, may I say this? You interrupted me, Counsel. This was the case, your Honor, that came on a week ago, asking that we take depositions and your Honor entered the order subject to our coming [fol. 60] back this morning to insert the times and dates of these depositions.

Following our hearing a week ago, we wrote Mr. Hayes and sent him a draft of the order which we left with the Clerk, inserting the dates and times at which we were proposing to take these depositions which we have been attempting to take since last February.

As I said last week and I reiterate it, this matter was thoroughly presented, argued and discussed before Judge Knoch. Very voluminous briefs were filed.

Counsel, in something like eighteen or nineteen pages of brief failed to cite the cases he seems to come up with at the present time. It may seem he is desperately drawing at straws.

I think all of our positions are set out in our case. We have clearly presented to the Court the rights of the claimants which, under the rules, should be allowed, to take the deposition of the petitioner, H. Leslie Atlass in this case and it seems that this is, and I am sure that my associate counsel here in another case representing another client, both concur in my statement, that this proceeding this morning is one more step to attempt to delay this for rea- [fol. 61] sons which I am sure Mr. Hayes knows better than we do.

We feel we are entitled to these depositions. The order was entered by your Honor and we are here this morning to fix the time.

May I suggest that these depositions, as set forth in the draft order left with the Clerk last week, read respectively December 16th, 17th and 18th?

By Mr. Hayes: The fact that—

By Mr. Liebenson: May I just say—

By Mr. Hayes: To be sure. You have been commendably quiet up until now.

By Mr. Liebenson: Judge, I just want to point out that the same brief that was filed here was filed before Judge Campbell. He ruled that the depositions would be granted. This is almost verbatim, your Honor. Your Honor has already ruled.

By the Court: I will stand by my order. Those citations coming up after I have ruled—there is no end to ruling upon motions and briefs.

By Mr. Macdonald: There must be a limit.

By the Court: Go ahead, Mr. Hayes.

By Mr. Hayes: The order, as suggested by counsel, [fol. 62] states the 16th, 17th and 18th for what depositions, Counsel?

By Mr. Macdonald: For the deposition of H. Leslie Atlass on the 16th of December at 10:00 o'clock, for Frank Johnson on the 17th of December at 10:00 o'clock; for the deposition of Robert L. Smith on the 17th.

By the Court: Of December.

By Mr. Macdonald: At 10:00 o'clock. And the deposition of John Wasilas on the 18th of December at 10:00 o'clock.

By Mr. Hayes: Your Honor, I have filed this morning affidavits which confirm the fact already admitted by my opponents that none of the conditions of the de bene esse act here exist as to any of these witnesses.

I have also included in that affidavit statements that none of these witnesses are in the employ of this respondent. As to one of them, he doesn't even know where he is. I wish it to be made clear, preferably in the audit, that I am not responsible for the production of counsel's witnesses; that I will produce my client if your Honor makes an order

which is then outstanding. I am not in defiance of any rul- [fol. 63] ing. I cannot be responsible for producing his witnesses. My client, that is one thing.

By the Court: I don't think I can require you to do so.

By Mr. Macdonald: That doesn't preclude us from asking for an order on these other parties.

By the Court: I am not requiring him to produce them.

By Mr. Macdonald: That is right.

By Mr. Hayes: Your Honor indicated also at the last hearing that if there continued to be an objection to this order as I have made it sufficiently plain that there is, that my exception and objection to this order in every aspect should be included in the order.

By the Court: Yes.

By Mr. Hayes: I would like to have that.

By the Court: You may reserve your objection to the order, to the procedure.

By Mr. Macdonald: Well, the order that we have proposed is to take the deposition of these four persons, including the claimant, for the purpose of discovery, for the proper preparation of these cases and if counsel has some other phase or adjunct to the order that he wishes to [fol. 64] propose, I suggest he here produce the draft.

By the Court: Well, the interrogatories and the depositions are taken subject to his objection.

By Mr. Macdonald: The record so shows that.

By Mr. Hayes: And the order, as the Court has indicated, will also show it.

By Mr. Macdonald: You have a copy of the order, Counsel.

By Mr. Hayes: Counsel prepared that draft and—

By Mr. Macdonald: I am not sure—

By Mr. Hayes: (Continuing) Excuse me. Counsel has not included it in the draft, which your Honor directed to be included.

By the Court: You may say "over the objection"—

By Mr. Macdonald: Your Honor did not direct that that be included.

By the Court: I have no objection if it is included, the specific objection.

By Mr. Macdonald: Well, Mr. Hayes can insert what he desires to have included in the order.

By Mr. Hayes: I can't make your Honor's order. I am asking that that be directed to be included.

By the Court: The record shows it is subject to your objection.

[fol. 65] By Mr. Hayes: And exception.

By the Court: Yes, and exception.

By Mr. Macdonald: (Addressing the Clerk) Do you have the dates I called off for the record?

By the Clerk: Yes, the 16th, 17th and 18th respectively. I will insert those.

By Mr. Macdonald: Fine.

By Mr. Hayes: May the order show as I indicated, your Honor?

By the Court: Yes.

By the Clerk: Who is going to amend that?

By Mr. Hayes: I presume his Honor will direct it to be inserted.

By the Court: Just insert in the order "Entry of the order is objected to by counsel."

By Mr. Macdonald: "Objected to by counsel for the petitioner." Is that satisfactory?

[fol. 66] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 67]

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

NOTES PRECEDING § 1781 OF 28 U.S.C.A. FORMER SECTIONS 639-641 OF TITLE 28, U.S.C.A., R.S. §§ 863, 864 AND 865 (DE BENE ESSE STATUTES)

CHAPTER 117—EVIDENCE; DEPOSITIONS

Sec.
1781. Foreign witnesses.
1782. Testimony for use in foreign country.
1783. Subpoena of witness in foreign country.
1784. Contempt.
1785. Privilege against incrimination.

Depositions in Admiralty Cases

Former sections 639-641 of Title 28 are applicable to admiralty proceedings only. Proceedings in bankruptcy and copyright are governed by Rule 26 et seq. of Federal Rules of Civil Procedure. See also General Orders in Bankruptcy Nos. 37 and 38, following section 53 of Title 11, Bankruptcy, and Rule 1 of Copyright Rules of Practice, following section 101 of Title 17, Copyrights.

Former sections 639-641 of Title 28 read as follows:

§ 639. Depositions de bene esse; when and where taken; notice.

The testimony of any witness may be taken in any civil cause depending in a district court by deposition de bene esse, when the witness lives at a greater distance from the place of trial than one hundred miles, or is bound on a voyage to sea, or is about to go out of the United States, or out of the district in which the case is to be tried, and to a greater distance than one hundred miles from the place of trial, before the time of trial, or when he is ancient and infirm. The deposition may be taken before any judge of any court of the United States, or any clerk of a district court, or any chancellor, justice, or judge of a supreme or superior court, mayor or chief magistrate of a city, judge of a county court or court of common pleas of any of the United States, or any notary public, not being of counsel or attorney to either of the parties, nor interested in the event of the cause. Reasonable notice must first be given in writing by the party or his attorney proposing to take such deposition, to the opposite party or his attorney of record, as either may be nearest, which notice shall state the name of the witness and the time and place of the taking of his deposition; and in all cases in rem, the person having the agency or possession of the property at the time of seizure shall be deemed the adverse party, until a claim shall have been put in; and whenever, by reason of the absence from the district and want of an attorney of record or other reason, the giving of the notice herein required shall be impracticable, it shall be lawful to take such depositions as there shall be urgent necessity for taking, upon such notice

as any judge authorized to hold courts in such district shall think reasonable and direct. Any person may be compelled to appear and depose as provided by this section, in the same manner as witnesses may be compelled to appear and testify in court. (R.S. § 863.)

§ 640. Same; mode of taking.

Every person deposing as provided in section 639 of this title shall be cautioned and sworn to testify the whole truth, and carefully examined. His testimony shall be reduced to writing or typewriting by the officer taking the deposition, or by some person under his personal supervision, or by the deponent himself in the officer's presence, and by no other person, and shall, after it has been reduced to writing or typewriting, be subscribed by the deponent. (R.S. § 864; May 23, 1900, c. 541, 31 Stat. 182.)

§ 641. Same; transmission to court.

Every deposition taken under sections 639 and 640 of this title shall be retained by the magistrate taking it, until he delivers it with his own hand into the court for which it is taken; or it shall, together with a certificate of the reasons as aforesaid of taking it and of the notice, if any, given to the adverse party, be by him sealed up and directed to such court, and remain under his seal until opened in court. But unless it appears to the satisfaction of the court that the witness is then dead, or gone out of the United States, or to a greater distance than one hundred miles from the place where the court is sitting, or that, by reason of age, sickness, bodily infirmity, or imprisonment, he is unable to travel and appear at court, such deposition shall not be used in the cause. (R.S. § 865.)

[fol. 68]

IN UNITED STATES DISTRICT COURT

Office of the Clerk
United States Court House
Chicago 4

Date: December 9, 1958

[Title omitted]

NOTICE AS TO REASSIGNMENT OF CAUSE ON DECEMBER 9, 1958

You are hereby notified that The Executive Committee entered the following order on December 9, 1958.

Order cause reassigned to Judge Robson's calendar.

Roy H. Johnson, Clerk.

[fol. 69]

IN THE UNITED STATES DISTRICT COURT

RULE 32 OF THE ADMIRALTY RULES OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EFFECTIVE MARCH 1, 1955

Rule 32—Depositions: Taking and Use of

The taking and use of depositions of parties and witnesses shall be governed by the Federal Rules of Civil Procedure except as otherwise provided by statute and except that their use shall be limited as hereinafter set forth.

Use of Depositions. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who was present or represented at the taking of the deposition or who had due notice thereof, in accordance with any of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.

(2) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: 1, that the witness is dead; or 2, that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is bound on a voyage to sea, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the depositions; or 3, that the witness is unable to attend or testify because of age, sickness, infirmity or imprisonment.

(3) If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce all of it which is relevant to the part introduced, and any party may introduce any other parts.

Substitution of parties does not affect the right to use depositions previously taken; and, when an action in any court of the United States or of any state has been dismissed and another action involving the same subject matter is afterwards brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter as if originally taken therefor.

This rule may be superseded by an agreement of the parties approved by the court.

[fol. 70]

In United States Court of Appeals
For the Seventh Circuit

Before: Hon. W. Lynn Parkinson, Circuit Judge.

Original Petition for Writ of Mandamus or Prohibition

H. Leslie Atlass, Petitioner,

No. 12516 *vs.*

Hon. Julius H. Miner and Hon. Edwin A. Robson, Judges of the United States District Court for the Northern District of Illinois, Respondents.
